Supreme Court, U.S.
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04-1170

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,
Petitioner,

v.

MICHAEL LEE MARSH II,
Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Michael Lee Marsh II, through the undersigned counsel, asks leave to file the attached Brief in Opposition to the Petition for Writ of Certiorari and to proceed *in forma pauperis*.

Mr. Marsh was declared indigent prior to his trial, in 1996. He has remained indigent and was represented by court-appointed counsel both in the trial court and the Kansas Supreme Court below.

Because of Mr. Marsh's poverty, he is unable to pay the costs of these proceedings or give security therefor. An affidavit from Mr. Marsh in support of this motion is attached hereto.

Respectfully submitted,

REBECCA E. WOODMAN
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700 Jackson, Suite 903
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Attorney for Respondent

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Petitioner,	)	
vs	)	Case No. 04-1170
MICHAEL LEE MARSH II, Respondent.	)	

Respondent's Declaration in Support of Motion for Leave to Proceed *In Forma Pauperis*

Declaration in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay any costs or fees in responding to the Petition for Certiorari or post a bond for them. I believe I am entitled to proceed *in forma pauperis*. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: Michael Marsh

Instructions

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none" or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date: 8 March 2005

1 For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise

Income source	**Average Monthly Amount during the past 12 months**		**Amount Expected next month**	
	You	**Spouse**	**You**	**Spouse**
Employment	$	$	$	$
Self-employment	$	$	$	$
Income from real property (such as rental income)	$	$	$	$
Interest and dividends	$	$	$	$
Gifts	$	$	$	$
Alimony	$	$	$	$
Child support	$	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$	$	$

Income source	Average Monthly Amount during the past 12 months		Amount Expected next month	
	You	**Spouse**	**You**	**Spouse**
Disability (such as social security, insurance payments)	$	$	$	$
Unemployment payments	$	$	$	$
Public assistance (such as welfare)	$	$	$	$
Other(specify)	$	$	$	$
Total monthly income:	$	$	$	$

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay

3 List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions)

Employer	Address	Dates of employment	Gross monthly pay
N/A			

4. How much cash do you and your spouse have? $ N/A

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A			

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns Do not list clothing and ordinary household furnishings.

Home (Value)

N/A

Other real estate (Value)

N/A

Motor Vehicle #1 (Value)

Make & year: N/A

Model: _____

Registration # _____

Motor Vehicle #2 (Value)

Make & year: N/A

Model: _____

Registration # _____

Other assets (Value)

N/A

6. State every person, business or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	**Amount owed to you**	**Amount owed to your spouse**
N/A		

7. State the persons who rely on you or your spouse for support.

Name	**Relationship**	**Age**
N/A		

8 Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? Yes ____ No ____ Is property insurance included? Yes ____ No ____	$	$
Utilities (electricity, heating fuel, water sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and Dental expenses	$	$
Transportation (not including motor vehicle payments)	$	$
Recreation, entertainment, newspapers, magazines, etc	$	$

	You	Your Spouse
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$	$
Life	$	$
Health	$	$
Motor vehicle	$	$
Other _____	$	$
Taxes (not deducted from wages or included in mortgage payments) (specify: _____)	$	$
Installment payments		
Motor vehicle	$	$
Credit card(name)_____	$	$
Department store(name)_____	$	$
Other _____	$	$
Alimony, maintenance, and support paid to others	$	$

	You	Your Spouse
Regular expenses for operation of business, profession or farm (attach detailed statement)	$ 0	$ 0
Other (specify)	$ 0	$ 0
Total monthly expenses	$ 0	$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

___Yes _X_ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying - an attorney any money for services in connection with this case, including the completion of this form?

___Yes _X_ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:

N/A

_____

_____

_____

11. Have you paid - or will you be paying - anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

____Yes ___No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

_____

_____

_____

_____

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

N/A

13. State the address of your legal residence:

[illegible] Eldorado Correctional Facility

P.O. Box 311 Central

El Dorado Kansas 67042

Your daytime phone number: (____) [illegible]

Your age 24 Your years of schooling: 12

Your social security number: 050 70 9542

ORIGINAL

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATUTORY PROVISION INVOLVED

28 U.S.C. § 1257(a) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

Michael Marsh's direct appeal was docketed in the Kansas Supreme Court in May, 1998, one month after the direct appeal in *State v. Kleypas* was docketed in the same court.[1] Subsequent to the filing of the appellant's brief in *Kleypas*, Mr. Marsh drafted an appellate brief which, in addition to raising issues unique to his case, raised several issues already briefed in *Kleypas*, including a challenge to the constitutionality of the equipoise formula set forth in K.S.A. 21-4624(e).[2] However, the Kansas Supreme Court rejected Mr. Marsh's brief as too lengthy, and directed him to file a shorter brief.

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[1] The Kansas Supreme Court's docketing lists for the Marsh case (No. 81135) and the Kleypas case (No. 80920) are published online at:
http://intra.kscourts.org:7780/pls/coa/clerks_office.request_case.

[2] Mr. Marsh raised this constitutional claim in the trial court, which denied it. At that time, the State of Kansas argued that the statutory weighing equation was constitutional under *Walton v. Arizona*, 497 U.S. 639 (1990).

Mr. Marsh then filed a motion to stay the briefing schedule pending a decision in *Kleypas*. The Kansas Supreme Court granted this motion.[3]

A decision was issued in the *Kleypas* case in December, 2001. *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), *cert. denied* 537 U.S. 834 (2002), set forth in the Appendix to the Petition for Certiorari ("Pet. App."), pp. 79a-142a. In that case, the Kansas Supreme Court declared K.S.A. 21-4624(e) unconstitutional as written, under the Eighth and Fourteenth Amendments. Pet. App., pp. 87a-88a, 96a-115a. After an exhaustive analysis of the constitutional claim in light of this Court's caselaw relating to capital sentencing, the *Kleypas* court held:

> "We see no way that the weighing equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments. We conclude K.S.A. 21-4624(e) as applied in this case is unconstitutional."

Pet. App., p. 115a. In reaching this conclusion, the *Kleypas* court carefully considered whether *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled on other grounds in Ring v. Arizona*, 536 U.S. 584 (2002), resolved the constitutional claim with respect to the Kansas statute. The issue had been extensively briefed by both parties, as well as an *amicus*. The court engaged in a detailed examination of the plain language of the Kansas statute in contrast to the statute at issue in *Walton* (both as written and as analyzed by this

---

[3] Mr. Marsh's motion to stay, and the Kansas Supreme Court's order granting the stay, are reproduced in the Appendix to this brief in opposition ("BIO App."), pp. 1-4.

Court), and found them substantively distinguishable:

> "The obvious distinction is the language used in each statute. The Arizona statute does not call for a weighing formula in which the mitigating circumstances must outweigh the aggravating circumstances, the very essence of the issue before this court. Such a weighing equation results in mandating a death sentence where the jury finds equipoise as to the mitigating and aggravating circumstances."

Pet. App., pp. 102a-103a.

While the *Kleypas* court found the Kansas statute unconstitutional as written, the court held that the statute could be saved "by simply invalidating the weighing equation" and construing it to read, "[I]f the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances . . . exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstances found to exist, the defendant shall be sentenced to death[.]" Pet. App., p. 119a. The court then ordered the case remanded for a new penalty trial under the judicially reconstructed weighing equation. *Id.*[4]

A few months after the *Kleypas* decision, Mr. Marsh filed his appellate brief in the Kansas Supreme Court. In Issue 19 of the brief, Mr. Marsh argued that his

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[4] Mr. Kleypas' motion for rehearing on the judicial reconstruction issue was denied. The State of Kansas filed no request for rehearing, nor did it respond to Mr. Kleypas' motion. Kleypas' subsequent petition for *certiorari*, which argued that state law created a due process life and liberty interest in being resentenced to life imprisonment upon the lower court's finding the statutory equipoise formula unconstitutional, was also denied. See *Kleypas v. Kansas*, 537 U.S. 834 (2002). No response or cross-petition for *certiorari* was filed by the State of Kansas.

death sentence must be set aside pursuant to the *Kleypas* holding that the statutory equipoise formula was unconstitutional as written. Mr. Marsh argued that, at the very least, his death sentence had to be vacated and his case remanded for a new penalty trial in accordance with *Kleypas*. However, Mr. Marsh argued further that the disposition in *Kleypas* was contrary to the proper disposition specifically required by statutory law, which entitled him to be resentenced to life imprisonment because a provision of the state's death penalty law was held unconstitutional.[5] In addition, he argued that, under well-established rules of statutory construction and separation of powers doctrine, the *Kleypas* court was wrong in reconstructing the statutory weighing equation after declaring it unconstitutional, given the unambiguous language used in the statute and evidence that the legislature intentionally chose to use that language. Accordingly, Mr. Marsh argued, the portion of the *Kleypas* decision that saved the statute through judicial reconstruction should be overruled. BIO App., pp. 5-10.

In its brief on appeal filed nearly one year later, the State of Kansas abandoned its earlier argument that the Kansas statutory weighing equation was constitutional under *Walton v. Arizona*. Instead, the State specifically conceded that the weighing equation as written was unconstitutional:

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[5] See K.S.A. 21-4629, which provides: "In the event a sentence of death or any provision of this act authorizing such sentence is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence and resentence the defendant as otherwise provided by law."

> "In *Kleypas, supra*, this Court found the application of the weighing equation in K.S.A. 21-4624(e) with respect to aggravating and mitigating factors to be unconstitutional when such application could result in the imposition of a death sentence when the aggravators and mitigators were found to be in equipoise. 40 P.3d at 232. Because Defendant's death sentence was imposed as a result of the same unconstitutional application of K.S.A. 21-4624(e) as occurred in *Kleypas*, the State concedes that his sentence must be set aside and his case remanded for resentencing in accordance with the *Kleypas* decision. 40 P.3d at 234."

BIO App., p. 13. The State of Kansas went on to argue that state law did not prohibit reimposition of the death penalty on remand, and that the *Kleypas* court's reconstruction of the statutory weighing equation to require that aggravating circumstances outweigh mitigating circumstances was within the court's lawful authority and did not violate separation of powers doctrine. BIO App., pp.13-17.

In its decision in Mr. Marsh's case, the Kansas Supreme Court explained that it had held in *Kleypas* that the statutory weighing equation was unconstitutional as written under the Eighth and Fourteenth Amendments, but "we avoided striking the statute down as unconstitutional on its face . . . by construing it to mean the opposite of what it said, *i.e.*, to require aggravating circumstances to outweigh mitigating circumstances." Pet. App., p. 18a. The Kansas Supreme Court then described the issue it was presented with in this case:

> "Here, Marsh correctly notes, and the State concedes, that *Kleypas* requires us to vacate Marsh's death sentence and remand for reconsideration of the death penalty under proper instructions on the weighing equation. Marsh makes the

> further argument, however, that K.S.A. 21-4624(e) is unconstitutional on its face and that the portion of our *Kleypas* decision that saved the statute through judicial construction must be overruled."

Pet. App., p. 19a.

The Kansas Supreme Court's majority opinion began by reciting the relevant portions of the *Kleypas* decision which "succinctly summarized" why the statutory weighing equation "as written did not comport with the Eighth and Fourteenth Amendments." Pet. App., pp. 19a-20a. "After full reconsideration," the majority rejected an invitation from two of the dissenters to "revisit" the constitutionality of the statute as written, stating that the court would "continue to adhere to the *Kleypas* majority's reasoning and holding that K.S.A. 21-4624(e) as written is unconstitutional under the Eighth and Fourteenth Amendments." Pet. App., pp. 20a- 21a.

The Kansas Supreme Court went on to conclude in the present case that, in reconstructing the statutory weighing equation to mean the opposite of what it said, the *Kleypas* court had misapplied the constitutional avoidance doctrine, because that doctrine "is applied appropriately *only* when a statute is ambiguous, vague, or overbroad" and "[t]he court's function is to interpret legislation, not rewrite it." Pet. App., p. 24a (emphasis in original). The error in *Kleypas*, the court found, was that the *Kleypas* majority had failed to apply the fundamental rule of statutory construction set forth in its own precedent, *i.e.*, that "'when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so

as to add something not readily found in the statute,'"[6] before moving to the canons that support the avoidance doctrine. Pet. App., p. 24a. The court observed that one of the dissenters in *Kleypas* had stressed the very point in arguing that, by adopting language "exactly the opposite of what the legislature stated," the *Kleypas* majority had invaded the province of the legislature. Pet. App., p. 25a (*Marsh* decision); Pet. App., pp. 120a-121a (*Kleypas* decision)(Davis, J., dissenting). The court agreed with that reasoning, and concluded below that "[t]he appropriate, limited judicial response to the problem identified for the first time in *Kleypas* was to hold K.S.A. 21-4624(e) unconstitutional on its face and let the legislature take such further action as it deemed proper." Pet. App., p. 26a. That conclusion, the court held, required it "to overrule that portion of *Kleypas* upholding the statute through application of the avoidance doctrine." Pet. App., p. 28a. It further held that principles of *stare decisis* did not prevent it from doing so in the situation presented, where the *Kleypas* court's application of the avoidance doctrine was not "fully vetted" and its rewriting of the statute "was not only clearly erroneous; as a constitutional adjudication, it encroached upon the power of the legislature." Pet. App., pp. 28a-31a.

Following the Kansas Supreme Court's decision in Mr. Marsh's case, the State of Kansas filed a motion for rehearing. The sole argument in the motion was that K.S.A. 21-4624(e) could be "saved" by severing the unconstitutional "equipoise"

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[6] See Pet. App., pp. 21a-22a, quoting *State ex rel. Graeber v. Marion County Landfill*, 276 Kan. 328, 339, 76 P.3d 1000, 1008 (2003).

provision from the remainder of the statute. By striking "three words and a suffix," the State argued, the statute would read to require that aggravating circumstances outweigh mitigating circumstances before a death sentence can be imposed. BIO App., pp. 18-27. Mr. Marsh replied that the severance doctrine did not apply: - that the State's argument called for the same rewriting of the plain and unambiguous statutory language that had required the court to overrule the part of *Kleypas* purporting to save the statute through judicial reconstruction. BIO App., pp. 28-30. The Kansas Supreme Court denied the State's motion. Pet. App., p. 78a.

REASONS WHY THE WRIT SHOULD BE DENIED

Contrary to Rule 14(g)(i), the State's petition for *certiorari* contains no "specification of the stage in the proceedings . . . when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by . . . [the] courts [below]." This omission is not simply inadvertent. The federal question that the State asks this Court to review was neither raised in the Kansas Supreme Court nor passed upon by that court in Mr. Marsh's case. The Kansas Supreme Court's judgment below was not entered in proceedings "where . . . the validity of a [state] statute . . . [was] drawn in question *on the ground of its being repugnant to the Constitution* . . . of the United States" or "where any right . . . [was] *specially set up or claimed under the Constitution*," disputed by the parties, or adjudicated by the court. 28 U.S.C. § 1257(a) (emphasis added). This Court accordingly has no jurisdiction to review

that judgment.

In the separate and distinct appeal in *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (Kan. 2001), *cert. denied* 537 U.S. 834 (2002), Gary Kleypas and the State of Kansas joined issue on the questions of the federal constitutionality of the equipoise instruction given to Mr. Kleypas's jury and of the Kansas statute requiring that instruction. The Kansas Supreme Court in *Kleypas* held the instruction unconstitutional but severed and upheld the remainder of the statute after excising the provision that contained the formula requiring the equipoise instruction. The present case between Michael Marsh and the State of Kansas then proceeded in the Kansas Supreme Court.

Mr. Marsh argued that under the federal constitutional ruling in *Kleypas* he was entitled at the least to a reversal of his death sentence and a new penalty trial. He went on to challenge the correctness of the severability decision in *Kleypas*, contending that the Kansas statute authorizing the death penalty had to be invalidated because of the flaw identified in *Kleypas* and that he could therefore not be subjected to a capital-sentencing retrial. Unlike Mr. Marsh, the State of Kansas in the present case did not contest any aspect of the earlier rulings in *Kleypas*. To the contrary, it explicitly accepted the *Kleypas* ruling invalidating the statutorily prescribed equipoise formula and conceded that Mr. Marsh was entitled to a reversal of his death sentence under that ruling.

As the Kansas Supreme Court described the positions of the parties, "the State concedes . . . that *Kleypas* requires us to vacate Marsh's death sentence and remand

for reconsideration of the death penalty under proper instructions"; "Marsh makes the further argument, however, that K.S.A. 21-4624(e) is unconstitutional on its face and that the portion of our *Kleypas* decision that saved the statute through judicial construction must be overruled." Pet. App., p. 19a. The State's response to this further argument was *not* that the statutory equipoise formula was federally constitutional but only that it was severable from the rest of the statute – a purely state-law contention.[7]

Upon the issue thus framed, the Kansas Supreme Court in Mr. Marsh's case overruled the portion of its *Kleypas* decision that had held the statute severable. This ruling was based upon "'a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained.'"[8] Even in its petition for rehearing of the *Marsh* ruling, the State did not

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[7] See, *e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976) (when a portion of a state legislative enactment is invalidated on federal constitutional grounds, the question of the severability of the remainder of the enactment is "only a state-law question" and presents "no federal, much less constitutional, question"); *Dorchy v. Kansas*, 264 U.S. 286, 325 (1924) (Justice Brandeis for a unanimous Court) (whether a state statute that is federally unconstitutional in part is severable "is a question of interpretation and of legislative intent. . . . ¶ The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court."), *followed by Bell v. Maryland*, 378 U.S. 226, 239-241 (1964).

[8] Pet. App., p. 21a, quoting *State ex rel. Graeber v. Marion County Landfill, Inc.*, 276 Kan. 328, 339, 76 P.3d 1000, 1008 (2003). See also Pet. App., p. 24a ("It is apparent to us that *Kleypas* failed to apply the fundamental rule of statutory construction as stated in *State ex rel. Graeber* before moving to application of the canons that support the avoidance doctrine. Indeed, the fundamental rule of statutory construction was not even noted in the [*Kleypas*] majority 's discussion and resolution of the equipoise issue."); Pet.

challenge the portion of the *Kleypas* decision that had held the equipoise formula federally unconstitutional.[9] Its submission for rehearing in *Marsh* continued to be only that the remainder of the statute should be severed from the federally unconstitutional

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App., p. 26a ("We agree with Justice Davis's reasoning and conclusion [in dissent in *Kleypas*] that the *Kleypas* majority erred in substituting a weighing equation with exactly the opposite effect of the equation provided by the legislature. The holding eviscerated the legislature's clear and unambiguous intent regarding equipoise and thus overstepped the judiciary's authority to interpret legislation rather than make it").

[9] In making this observation, we do not suggest that the State could have preserved a federal constitutional issue for this Court's review by raising it for the first time in a motion for rehearing in the Kansas Supreme Court. "The long-established general rule is that the attempt, to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it . . . [or unless] the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction . . . [so that] the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." *Herndon v. Georgia*, 295 U.S. 441, 443-444 (1935). See also, *e.g.*, *Fullerton v. Texas*, 196 U.S. 192, 193 (1905). The latter "exception to the rule," *Herndon*, 295 U.S. at 444, would not apply here, even if the State had undertaken to resuscitate the issue of the federal constitutionality of the equipoise provision after the Kansas Supreme Court in *Marsh* held the rest of the statute inseverable from that provision. The basis for the court's inseverability holding was Marsh's explicit contention, after *Kleypas*, that the severability aspect of the *Kleypas* decision was wrong and should be overruled. The State took issue with that contention – obviously perceiving that the Kansas Supreme Court would consider it and might find it persuasive – but the State's rejoinder to the contention was solely that the equipoise-instruction provision was severable, not that it was constitutional. The State not only could have anticipated the Kansas Supreme Court's decision of which it now complains; the State *did* anticipate that decision. And, anticipating it, the State deliberately chose not to argue against such a decision on federal constitutional grounds but only on state statutory grounds. But while this choice would doubtless have precluded it from interjecting the federal issue of the constitutionality of the equipoise formula into the case belatedly on its motion for rehearing even if it had attempted to do that, the motion for rehearing itself *also* explicitly withdrew the issue from the State's submission and from the Kansas Supreme Court's consideration. See note 10 *infra*.

provision embodying the equipoise formula.[10]

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[10] The State 's Motion for Rehearing is reproduced at BIO App., pp. 18-27. It begins by saying that the motion for rehearing is filed "in order to address the applicability of the severability provisions of K.S.A. 21-4630 to K.S.A. 21-4624 (the death penalty statute), and whether the application of K.S.A. 21-4630 will allow the unconstitutional 'equipoise' instruction to be severed and the remaining constitutional provisions of the death penalty statute to be given effect." BIO App., p. 18. A footnote in the motion for rehearing recites:

> "The State still holds the position that the statute as written is constitutional, but for the sake of this Motion for Rehearing, the State accepts this Court's interpretation to the contrary. The State did not argue for the constitutionality of the statute as written in its brief because at the time *State v. Kleypas* . . . was controlling law, and had been resolved contrary to the State's position. The State did not believe it was appropriate to raise an argument before this Court which it had already been [sic] squarely considered and decided only a matter of months earlier, with no intervening change in law. However, this should not be viewed as a concession of the issue. The State could not reasonably foresee that this Court would overrule *Kleypas*. Should this Motion for Rehearing be denied, or should the Court uphold its present ruling upon rehearing, the State still intends to seek review in the United States Supreme Court, challenging this Court's determination that the weighing equation in K.S.A. 21-4624 violates the United States Constitution."

BIO App., pp. 19-20, n. 1. Thus, while admitting that the State had not previously defended the Kansas death-penalty statute on the ground that the statutory equipoise formula was federally constitutional, the State's motion for rehearing simultaneously (1) explained this failure by asserting that the "State could not reasonably foresee that this Court would overrule *Kleypas*" – a factually erroneous proposition but one which, if true, would have enabled it to preserve its federal defense by urging the Kansas Supreme Court to uphold the federal constitutionality of the equipoise instruction upon rehearing, see note 9 *supra*; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-678 (1930) – and (2) *still* declined to submit the federal issue for consideration and decision by the Kansas Supreme Court below.

Under these circumstances, the State cannot be heard in this Court to argue that the federal constitutional holding of *Kleypas* invalidating the equipoise instruction and its statutory authorizing provision was wrong. The State did not raise that issue in the Kansas Supreme Court in Mr. Marsh's case. It and the Kansas Supreme Court both treated Mr. Marsh's case as raising solely the state-law issue whether the rest of Kansas's death-penalty statute was severable from the provision that *Kleypas* had invalidated. Having limited the scope of the controversy below to the single issue of severability, the State cannot now claim that it put the validity or invalidity of the Kansas death-penalty statute into question in the Kansas Supreme Court "on the ground of its being repugnant to the Constitution," as was required in order bring the case within this Court's jurisdiction under 28 U.S.C. § 1257(a).

Illinois v. Gates, 462 U.S. 213 (1986), is controlling on this point. In *Gates*, state criminal defendants (a husband and wife) raised a federal constitutional claim (that a search warrant for their car and residence had been issued without probable cause, in violation of the Fourth Amendment) as the basis for a motion to suppress evidence. The state trial court granted the motion; an intermediate state appellate court affirmed; and in the Illinois Supreme Court the State opposed the defendants' federal constitutional claim on a single ground (that there *was* probable cause for the issuance of the warrant). The Illinois Supreme Court rejected that ground of defense against the federal claim and entered judgment for the defendants on the claim (holding, specifically, that the evidence

had to be suppressed as the fruit of a search conducted under a warrant issued in violation of the Fourth Amendment to the Constitution of the United States). On the State's petition for *certiorari*, this Court refused to hear a *different* ground of defense offered by the State against the Gates defendants' federal constitutional claim (the defense that the Fourth Amendment exclusionary rule does not require the suppression of evidence seized under a search warrant issued without probable cause). Chief Justice Rehnquist explained:

> "It is clear in this case that respondents expressly raised, at every level of the Illinois judicial system, the claim that the Fourth Amendment had been violated by the actions of the Illinois police and that the evidence seized by the officers should be excluded from their trial. It also is clear that the State challenged, at every level of the Illinois court system, respondents' claim that the substantive requirements of the Fourth Amendment had been violated. The State never, however, raised or addressed the question whether the federal exclusionary rule should be modified in any respect, and none of the opinions of the Illinois courts give any indication that the question was considered.
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> "The case, of course, is before us on the State' s petition for a writ of certiorari. Since the Act of December 23, 1914, c. 2, 38 Stat. 790, jurisdiction has been vested in this Court to review state court decisions even when a claimed federal right has been upheld. Our prior decisions interpreting the 'not pressed or passed on below' rule have not, however, involved a State's failure to raise a defense to a federal right or remedy asserted below. As explained below, however, we can see no reason to treat the State's failure to have challenged an asserted federal claim differently from the failure of the proponent of a federal claim to have raised that claim."

462 U.S. at 220-221.

In short, when the opponent of a federal constitutional claim defends against it on a ground that fails to put a particular constitutional issue into controversy in the state courts, s/he can no more raise the issue for the first time in this Court than the proponent of a federal constitutional claim can raise the claim for the first time in this Court.

The force of that rule is substantially stronger in the present case than in *Gates*. Chief Justice Rehnquist's *Gates* opinion observed that, although the Court had "held early on that . . . [the predecessor of 28 U.S.C. § 1257] furnished us with no jurisdiction unless a federal question had been both raised and decided in the state courts below" (*Gates*, 462 U.S. at 218), "several of our more recent cases have treated the so-called 'not pressed or passed upon below' rule as merely a prudential restriction" rather than as a jurisdictional limitation (*Gates*, 462 U.S. at 219). And the *Gates* opinion did not undertake to resolve the "inconsistent views [in the cases it discussed] as to whether this rule is jurisdictional or prudential in cases arising from state courts." *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); see *Howell v. Mississippi*, 125 S. Ct. 856, 860 (2004). But both in *Gates* and in the cases that *Gates* cited for the "prudential" view,[11] there was *another* federal constitutional issue in the case, distinct from the issue that gave rise to the discussion of the "not pressed or passed upon below " rule; and this *other* issue

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[11] *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Vachon v. New Hampshire*, 414 U.S. 478 (1974).

plainly sufficed to support the Court's jurisdiction because it had been duly preserved by proceedings in the state courts through which "the validity of a statute . . . [had been] drawn in question on the ground of its being repugnant to the Constitution . . . [or through which a] right . . . [had been] specially set up or claimed under the Constitution," within 28 U.S.C. § 1257(a).[12] In that situation, the question whether, instead of addressing the duly-preserved issue, the Court could properly decide the case on a different federal issue – one not duly preserved because "not pressed or passed upon below " – may well be prudential rather than jurisdictional. But where, as in the present case, the *only* federal issue raised in a petition for *certiorari* was "not pressed or passed upon below," it is difficult to see how the terms of § 1257(a) permit any other conclusion than that this Court lacks jurisdiction of the case.

In any event, the 'not pressed or passed upon below' rule, whether conceived as jurisdictional or prudential, has consistently been applied by this Court to forbid a party who has raised only contention *X* in the state courts to switch position and raise contention *Y* here, even when both contentions are federal. See, *e.g.*, *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940) (this Court will not hear claims "which suitors have failed to urge before . . . [the state's highest court], or which, in the course of proceedings there, have been abandoned," *id.* at 435).

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[12] In *Gates*, for example, the State of Illinois had duly preserved the issue whether probable cause was shown for the issuance of the search warrant challenged by the Gates defendants. Indeed, Illinois won the *Gates* case in this Court on precisely that issue.

> "In *Dewey v. Des Moines*, 173 U.S. 193 [(1899)], it was held that where a Federal question is raised in the state courts, the party who resorts to this court cannot raise another Federal question, not connected with it, which was not raised in any of the courts below.
>
> "To justify our taking jurisdiction, the Federal question must be specially set up or claimed in the state court; the party must have the intent to invoke for the protection of his rights the Constitution or some statute or treaty of the United States, and such intention must be declared in some unmistakable manner. *Oxley Stave Company v. Butler County*, 166 U.S. 648 [(1897)]. 'In other words, the court must be able to see clearly from the whole record that a provision of the Constitution or act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. . . .'"

Keokuk and Hamilton Bridge Company v. Illinois, 175 U.S. 626, 633-634 (1900), quoting *Dewey*, 173 U.S. at 198. *A fortiori*, when a party has argued only state-law issues in the state courts, s/he may not switch position and present a federal issue here. That has always been the rule of this Court. *E.g.*, *Levy v. Superior Court*, 167 U.S. 175, 177-178 (1897); *Howell v. Mississippi*, *supra* (this Term). And more than a century ago the Court applied the rule in a case remarkably similar to Mr. Marsh's. In *Morrison v. Watson*, 154 U.S. 111, 115 (1894), the North Carolina Supreme Court, having heard and rejected a claim of federal unconstitutionality of a state statute in an earlier case, applied the statute in Morrison's case with the explanation that it had been relevantly construed and upheld against constitutional challenge in the earlier case. This Court held explicitly that the reiteration failed to give the Court jurisdiction to review the previously adjudicated

federal issue, in the absence of a renewed controversy between the parties on the specific point.[13] "Under these circumstances," Justice Gray wrote for the Court, "the fact that in .

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[13] *Morrison* so held even though, at that time, it was this Court's practice to entertain constitutional challenges to state statutes framed in less precise terms than other federal questions, distinguishing between the specificity required in order that the validity of a state statute be "drawn in question" and the specificity required in order that a title, right, privilege or immunity be "specially set up or claimed," within the meaning of the then-extant predecessor of present 28 U.S.C. § 1257. (See, *e.g.*, *Harding v. Illinois*, 196 U.S. 78, 85-86 (1904).) "[T]his distinction does not seem to have survived and has no persisting effect in distinguishing between the different grounds for certiorari jurisdiction in the present statute." 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, Jurisdiction.2d § 4022 (1996). Indeed, since at least the 1940's the Court has consistently rejected the notion that an issue regarding the constitutionality of a state statute can be pleaded less specifically than other federal issues for the purpose of its jurisdiction under § 1257. See, *e.g.*, *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185 (1945) ("[i]t is essential to our jurisdiction on appeal under §237(a) that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws"), *followed by Raley v. Ohio*, 360 U.S. 423, 435 (1959) (Court dismisses appeal for lack of jurisdiction but considers merits on *certiorari* because various rights, privileges and immunities under the Constitution were claimed); *Rohr Aircraft Corporation v. County of San Diego*, 362 U.S. 628, 629-630 (1960) (same); *Slagle v. Ohio*, 366 U.S. 259, 264 (1961) (same); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n. 4 (1980) (same: "[a]ppellants never explicitly challenged the statute's validity"). *Compare Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 473 n. 4 (1989) (Court finds jurisdiction because "appellant explicitly drew in question the validity of . . . [a state statute] on federal grounds."); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 544 n. 3 (1987) (Court finds jurisdiction because "[a]ppellants squarely challenged the constitutionality of . . . [a state statute], as applied, and the Court of Appeal sustained the validity of the statute as applied."); *R.J. Reynolds Tobacco Company v. Durham County*, 479 U.S. 130, 136 (1986) (Court finds jurisdiction because "Reynolds explicitly drew the ad valorem property tax, as applied to its imported tobacco, into constitutional question, and the North Carolina courts upheld the validity of the tax."); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-441 (1979) (Court finds jurisdiction because "appellants squarely challenged the constitutionality of the tax statute, as applied, and the California Supreme Court just as squarely sustained its validity, as applied."); *Coates v. City of Cincinnati*, 402 U.S. 611, 612 (1971) (Court

. . [the North Carolina Supreme Court's *Morrison*] opinion the construction and validity of the statute were treated as settled by the ruling in the earlier case . . . and were restated by way of explanation of the defense at the trial of the present case, fall short of showing that there was any real contest at any stage of this case upon the point."[14]

Here, too, there was no "real contest" in the Kansas Supreme Court in "this case upon the point " that the State seeks to have this Court decide on *certiorari*. The State describes that point – the Question Presented by its petition – as being:

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recites that it noted probable jurisdiction of an appeal where "throughout this litigation it has been appellant's position that the ordinance on its face violates the First and Fourteenth Amendments of the Constitution.").

[14] As in *Morrison*, the Kansas Supreme Court here reiterated its *Kleypas* holding. See Pet. App., pp. 19a-21a. But, as in *Morrison*, this kind of reiteration of an earlier holding, in the absence of any contention by a party that the earlier holding should be reconsidered, does not "show[ ] that there was any real contest at any stage of this case upon the point" See *Black v. Cutter Laboratories*, 351 U.S. 292, 297-298 (1956):

> "This Court . . .reviews judgments, not statements in opinions. . . . At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds."

And once the State conceded that the *Kleypas* holding invalidating the statutory equipoise formula should be accepted as the rule of decision and the starting point for severability analysis in Mr. Marsh's appeal, "it follows as a necessary consequence, that the question submitted to the court and decided by them was one of construction, and not of validity." *Commercial Bank of Cincinnati v. Buckingham's Executors*, 46 U.S. 317, 342 (1847).

> "Does it violate the Constitution for a state capital sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise?"

(Petition for Certiorari, p. 1.) The Supreme Court of Kansas decided *that* question in the case of *State of Kansas v. Gary W. Kleypas*, not in the present case.[15] The State could have put the point in controversy once again in the present case by contending in its subsequent briefing and argument to the Kansas Supreme Court in Michael Marsh's appeal that *Kleypas* had been wrongly decided. Had it done so, Michael Marsh's appeal – the case now at bar – would have been one "where the validity of a statute of . . . [a] State is drawn in question on the ground of its being repugnant to the Constitution of the United States," within this Court's jurisdictional charter, 28 U.S.C. § 1257(a). But the State of Kansas did not do so. Mr. Marsh alone took issue with any part of the *Kleypas*

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[15] It is instructive to compare the *syllabi* written by the court to specify exactly what it was holding in each of the two cases. The only paragraph in the *Marsh* syllabus dealing with the constitutionality of the Kansas death-penalty statute is the paragraph numbered 25 at Pet. App., p. 5a. It contains three sentences explaining why the statute as a whole is non-severable, followed by a final sentence saying that "As a result," the statute is facially unconstitutional under the Eighth and Fourteenth Amendments. Paragraph 25 is one of a suite of paragraphs – from paragraph 18 at Pet. App., p. 3a through paragraph 26 at Pet. App., p. 6a – *all* of which have *only* to do with severability analysis and related principles of statutory construction. The issue that the State seeks to present to this Court in its petition for *certiorari* – whether the equipoise provision itself offends the federal Constitution – is nowhere mentioned in the *Marsh* syllabus because it was not decided on the *Marsh* appeal. In stark contrast, the *Kleypas* syllabus enunciates federal Eighth Amendment principles in paragraphs 43-44 at Pet. App., p. 87a and reasons from them (in paragraph 45 at Pet. App., pp. 87a-88a) that K.S.A. 21-4624(e), the equipoise provision "denies what the Eighth Amendment requires." This is the precise Question Presented at page i of the State's Petition for Certiorari.

decision; and the issue that Mr. Marsh took with *Kleypas* concerned its severability holding alone.

Advised that Mr. Marsh was asking the Supreme Court of Kansas to reconsider this aspect of *Kleypas* and to hold the Kansas death-penalty statute nonseverable, the State took issue with Mr. Marsh's submission solely on the state-law ground of severability *vel non*. And even after the Kansas Supreme Court in Mr. Marsh's case held the statute nonseverable – a holding that plainly cannot confer jurisdiction on this Court, see *New York v. Uplinger*, 467 U.S. 246, 249 n. 2 (1984), and note 7 *supra* – the State's motion for rehearing *still* declined to present any federal constitutional controversy for decision by the Kansas courts.

Title 28 U.S.C. § 1257(a) describes the jurisdictional bases that must exist before a state-court judgment "may be reviewed" by this Court. The Court cannot "review " the question of the "validity" of Kansas's statutory equipoise formula "on the ground of its being repugnant to the Constitution " (§ 1257(a)) because that question was "not pressed or passed upon below" but was conceded by the State in the Kansas Supreme Court to have been resolved in the earlier *Kleypas* case.[16] And it cannot review the

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[16] "It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. . . . It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature." *Mellon v. O'Neil*, 275 U.S. 212, 214-215 (1927).

severability issue on which the validity of the statute *was* called into question in the Kansas Supreme Court because that question is "no[t] federal, much less constitutional." *City of New Orleans v. Dukes*, 427 U.S. at 302, cited and quoted in note 7 *supra*.

CONCLUSION

Certiorari should be denied because the Court has no jurisdiction in the premises.

Respectfully submitted,

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APPENDIX